

**ORDER NO. R8-2002-0012, SAN BERNARDINO COUNTY MS4 PERMIT
RESPONSE TO COMMENTS ON THE MARCH 22, 2002 DRAFT**

**A. E-MAIL COMMENTS FROM THE CITY OF REDLANDS, DATED
MARCH 28, 2002**

1. **Comment:** Page 17 of 67, sub-paragraph 10. Responsibilities of the Co-Permittees:
Please define “respond”. If it means to actually respond to spills, and discharges that may consist of hazardous substances, then additional language should be added to the pages discussing inspector training criteria (Page 26 of 67, sub-paragraph 9)

If responding to hazardous substances, Hazardous Materials Operations First Responder Awareness, or even First Responder Operation may be required. This is a concern due to the definition of a hazardous substance as interpreted by OSHA in 29 CFR.

Response: Please see revised language. The revised language allows the co-permittees to arrange for responding to emergency situations requiring specialized training if it does not have appropriately trained staff to respond to such situations. The need for appropriate training and the training requirements are specified elsewhere (Please see California Code of Regulations, Title 8). Pursuant to Title 8, California Code of Regulations, Sections 3203 and 5192, the employer must ensure appropriate level of training for its employees consistent with the level of occupational hazard expected to be encountered as part of their assigned duties. This permit does not attempt to repeat the training requirements for hazardous waste or other type of inspectors.

2. **Comment:** There is a “typo” on page 22 of 67, (January 31, 20032). Same typo on page 63.

Response: Corrected.

**B. COMMENTS FROM DEFEND THE BAY AND THE NATIONAL
RESOURCES DEFENSE COUNCIL (NRDC) – DATED APRIL 8, 2002**

3. **Comment:** Receiving Water Limitations (Section IV.3): In response to comments from the San Bernardino County Flood Control District, the Regional Board has changed paragraph 3 of the receiving water limitations to state that the “permittees shall **demonstrate** compliance...” rather than the “permittees **shall assure compliance**...” The State Board has addressed this... Please replace the original language so as to be consistent with State Board Order 99-05.

Response: The revised draft has the language consistent with State Board Order No. 99-05 and recommended by the commenter.

4. **Comment:** New Development (Section XII): Paragraph A.7. The Draft permit now requires the permittees to “**confirm** that these principles and policies are properly considered and incorporated into [General Plan and related documents.]” In this case, again, the original language should be replaced so that the Permit states that the permittees must “**ensure** that these principles... are incorporated into these documents.”

This is not the case in which the permittees are unable to “ensure” that this Permit requirement can be met. The permittees, as cities and counties, can ensure that the appropriate language is put into their General Plan documents. Thus the original language should be replaced...

Response: The revised draft has the language recommended by the commenter.

5. **Comment:** New Development(Section XII): The definition of “significant re-development” has been improved to include “the addition or creation of 5,000 or more square feet of impervious surfaces” which does encompass the replacement of impervious surfaces on the site, as directed by the State Board in Order 2000-11. However,... still leaves out the clarifying language from Order 2000-11....which states...”Redevelopment includes, but is not limited to, the expansion of a building footprint or addition or replacement of a structure; structural development including an increase in gross surface floor area and/or exterior construction or remodeling; replacement of impervious surface that is not part of a routine maintenance activity; land disturbing activities related with structural or impervious surfaces.”...As the State Board’s language makes clear, replacement of a structure is included.

Response: We believe that the current language in the permit is consistent with the Chief Counsel’s December 26, 2000 letter to the Regional Board Executive Officers that explained State Board Order WQ 2000-11. Item 2 of this letter states, in part, “Redevelopment projects that are within one of these categories are included if the redevelopment adds or creates at least 5,000 square feet of impervious surface to the original developments”.

6. **Comment:** Legal Authority/Enforcement (Section VI.5): ...We urge the Regional Board to either delete the entire alternative to prohibiting the non-storm water discharges contained in the parenthetical of paragraph 5, which would be most consistent with the Clean Water Act, or in the alternative, at the very least replace the new language in this draft with the language that was in the previous draft (and that is also found in the Orange County MS4 Permit). This language stated that the “permittees may propose appropriate control measures in lieu of prohibiting these discharges, **where the permittees are**

responsible for ensuring that dischargers adequately maintain these control measures.” Because the Clean Water Act requires that non-storm water discharges be prohibited, it is not enough to merely require that the permittees **monitor** those control measures. The permittees must **require and ensure** that those control measures are maintained so that the discharges do not get into the storm sewers...

Response: Please refer to the revised language.

7. **Comment:** Definition of MEP: This Draft Permit deletes the entire full definition for MEP in the definitions section of the permit, which was based on a memo written by the State Board. ...the Regional Board has replaced it with an inappropriate and arguably illegal definition that was contained in a footnote in previous drafts (to which we also objected).we again suggest the following definition of MEP, which is relatively simple and consistent with the law, from the Los Angeles County Permit:

MEP means the standard for implementation of storm water management programs to reduce pollutants in storm water. CWA section 402(p)(3)(B)(iii) requires that municipal permits “shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. Specifically, municipalities must choose effective BMPs, and reject applicable BMPs only where other effective BMPs will serve the same purpose.

Response: Definition changed as suggested.

**C. COMMENTS FROM RICHARDS/WATSON/GERSHON, DATED
APRIL 8, 2002**

8. **Comment:** We disagree with the Regional Board’s Response 162 to compliance with the Administrative Procedures Act (“APA”). Specifically, the Cities believe that the failure by the Regional Board to institute formal rulemaking early in the process will leave open a basis for attacking the Permit, once adopted, on the ground that the Regional Board failed to comply with the APA.

Response: Comments noted; we believe that this issue has been intensely debated and the State Board decision on this matter and other related regulations were discussed in our earlier response (Item 162).

9. **Comment:** The Tentative Draft Fails to Provide a “Safe Harbor” Provision for the Permittees. While the Cities appreciate the Regional Board’s comments in Response 163, we disagree with the Regional Board’s position that “The disadvantage of such provisions is that they have the effect of restricting the Regional Board’s proper exercise of enforcement authority.”...We also disagree with the Regional Board’s interpretation of WQ 99-05 and WQ 2001-15 that these State Board Orders prohibit the Regional Board from including a safe harbor provision in the Tentative Draft....A “Safe Harbor” provision would provide the Cities and the permittees with important protections from third-party liability once they have implemented the storm water management programs prescribed in the Tentative Draft...

Response: Comments noted; we believe that we have adequately addressed this issue in our earlier response (Item 163).